# Nos. 12,300 and 12,301

IN THE

# United States Court of Appeals

## For the Ninth Circuit

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, and JEAN LANE, individually and as Chief of Police of the County of Maui, *Appellants,*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

E. R. BEVINS, individually and as County Attorney for the County of Maui, and WENDELL F. CROCKETT, individually and as Deputy to the County Attorney for the County of Maui, *Appellants,*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

No. 12,300

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, *Appellant,*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

E. R. BEVINS, individually and as County Attorney for the County of Maui, and WENDELL F. CROCKETT, individually and as Deputy to the County Attorney for the County of Maui, *Appellants,*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

No. 12,301

**Upon Appeal from the United States District Court for the District of Hawaii.**

## BRIEF OF AMICUS CURIAE.

THE BAR ASSOCIATION OF HAWAII,
Honolulu, T. H.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

## Subject Index

## Table of Authorities Cited

## Statutes and Miscellaneous

Nos. 12,300 and 12,301

IN THE

# United States Court of Appeals

## For the Ninth Circuit

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, and JEAN LANE, individually and as Chief of Police of the County of Maui, *Appellants,*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

E. R. BEVINS, individually and as County Attorney for the County of Maui, and WENDELL F. CROCKETT, individually and as Deputy to the County Attorney for the County of Maui, *Appellants,* — No. 12,300

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

WALTER D. ACKERMAN, JR., individually and as Attorney General of the Territory of Hawaii, *Appellant,*

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

E. R. BEVINS, individually and as County Attorney for the County of Maui, and WENDELL F. CROCKETT, individually and as Deputy to the County Attorney for the County of Maui, *Appellants,* — No. 12,301

vs.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, a voluntary unincorporated association and labor union, et al., *Appellees.*

**Upon Appeal from the United States District Court for the District of Hawaii.**

# BRIEF OF AMICUS CURIAE.

## INTEREST OF THE BAR ASSOCIATION OF HAWAII.

This brief of The Bar Association of Hawaii has been made available to all members of the Association for perusal. By vote of the Association at a special meeting thereof, it has been filed herein.

The decision filed by the United States District Court for the District of Hawaii[1] raises certain questions regarding the relationship between the courts of the Territoy of Hawaii and the courts of the United States. Specifically, the decision holds that the United States District Court for the District of Hawaii may intervene in pending criminal proceedings before the territorial courts and stay said proceedings whenever the court finds circumstances exist indicating that the prosecutions are not being carried on in good faith, or where the enforcement of territorial statutes will result in the limitation of the exercise of certain rights provided for by federal law and where irreparable damage will result from the enforcement of said territorial statutes.

The District Court herein also holds that in the stay of such territorial court proceedings, it may pass upon

---

[1]The trial court functioned as a statutory three-judge court under 28 U.S.C. Sec. 2281 and found itself properly constituted as such (R. 412-432). It also, in the alternative, found itself to be a properly constituted United States District Court for the District of Hawaii sitting *en banc* (R. 432-438). The subsequent decision of the United States Supreme Court in *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, that the Territory of Hawaii is not a "state" within the meaning of 28 U.S.C. Sec. 380 (revised without any change of importance in this matter to 28 U.S.C. Secs. 2281, 2284). The Supreme Court of the United States adopted the view of The Bar Association of Hawaii advanced in its *amicus* brief filed at the request of the three-judge District Court. The effect of this decision is to eliminate the first ground of jurisdiction relied upon.

the constitutionality of the territorial statutes irrespective as to whether a determination thereon has been made by the territorial courts. The District Court also holds it may review the decisions of inferior and superior territorial courts, and may make determinations as to the constitutionality of jury selections.

Since these determinations seriously affect the jurisdiction of the courts of the Territory of Hawaii as components in an independent judicial system, The Bar Association of Hawaii desires to direct its brief to the question of the relative jurisdictions of the territorial and federal courts, the relationship between them and the dependence upon, or independence of, one judicial system to the other.

In addition, to the extent that the opinion filed by the District Court, either directly or by innuendo, reflects upon the character or integrity of any judges of the courts of the Territory of Hawaii, The Bar Asociation of Hawaii, comprised of attorneys who are officers of that Court, has an interest and responsibility[2] in defending the character of the incumbents so reflected upon, and in securing a correction of the record in that respect.

No consideration will be given herein to the constitutionality of any territorial statute or of any method of selection of jurors in the Territory of Hawaii, but

---

[2]". . . Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor . . ." Canons of Professional Ethics, The American Bar Association, Canon 1.

the brief is to be confined to the jurisdictional issues raised and the factual findings upon which the court below justifies its intervention to stay territorial court proceedings.

---

## SUMMARY OF ARGUMENT.

A United States District Court may not enjoin criminal proceedings pending in state courts because of congressional prohibitions against such intervention. This is so, irrespective of the circumstances surrounding the state court criminal proceedings, the methods or motives of state prosecuting officers, or any other factors.

While the legislative prohibitions against federal intervention in pending proceedings in state courts may not extend *in haec verba* to territorial courts, the relationship between the federal courts and the courts of the Territory of Hawaii is such as to require that the courts of the Territory be permitted to adjudicate pending cases free from federal court interference. All the basic reasons for state freedom from federal court intervention apply with equal or greater effect to the relations between the courts of the Territory of Hawaii and the federal courts. The necessity for a judicial system in the Territory of Hawaii free from federal court interference has been judicially recognized.

Federal courts have intervened to stay threatened criminal proceedings for the enforcement of state laws only where exceptional circumstances have been

found, which circumstances have legally justified such intervention. Similarly, exceptional circumstances must be found to justify intervention by the United States District Court for the District of Hawaii to stay the threatened enforcement of territorial statutes. The record and evidence in the instant case fail to show the exceptional circumstances which justify intervention by the district court in staying the threatened enforcement of territorial criminal statutes. The findings made by the trial court to support its exercise of jurisdiction in this regard are unsupported by the evidence in the record.

With no basis for intervention, the district court acted with impropriety in enjoining the enforcement of territorial statutes staying prosecutions pending in the territorial courts, reviewing the decisions of the inferior territorial courts on the constitutionality of the method of the selection of the grand jurors, and of the Supreme Court of the Territory of Hawaii on the constitutionality of a territorial criminal statute. Because of such impropriety and lack of inherent jurisdiction in the district court, the judgment of that court should be reversed.

## I.

### THE ISSUANCE OF A STAY BY THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII AGAINST THE PROSECUTION OF PENDING CRIMINAL PROCEEDINGS IN THE COURTS OF THE TERRITORY OF HAWAII WAS UNDER THE CIRCUMSTANCES OF THIS CASE IMPROPER; BECAUSE OF SUCH IMPROPRIETY THE INJUNCTION MUST BE DISSOLVED AND THE DECREE REVERSED.

Sections 2281 to 2284, inclusive, of Title 28 U.S.C., provide that injunctions may be issued by three-judge district courts of the United States against the enforcement of state statutes under certain circumstances. This extraordinary jurisdiction is, as shall be shown, to be narrowly confined.

As a result of the case of *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, the jurisdiction of the courts of the United States to enjoin the enforcement of allegedly unconstitutional statutes of the Territory of Hawaii does not rest upon the express statutory provisions for the three-judge district courts, but if jurisdiction does exist in a district court of the United States to enjoin the enforcement of territorial statutes, it is by virtue of inherent equity powers of the United States district court.

While the decisions of the Supreme Court of the United States involving the impropriety of injunctions by federal courts against the enforcement of unconstitutional legislation, other than federal legislation, have involved state statutes or constitutions rather than territorial laws, the principles laid down in such cases, although not controlling, should furnish this Court a persuasive guide for the determination of the propriety of the action of the court below.

**A. Inherent powers of federal equity courts to enjoin criminal proceedings.**

A line of supreme court cases dealing with the problem of the inherent powers of federal courts sitting in equity to enjoin criminal proceedings has led to certain well-defined principles which may be stated as follows:

1. An equity court will not ordinarily enjoin the enforcement of a criminal statute, the person proceeded against having an adequate legal remedy in the criminal proceeding.

2. An allegation of unconstitutionality of a criminal statute, the enforcement of which is sought to be enjoined, does not furnish a proper basis for an equity court exercising its powers. If the statute is unconstitutional, that fact may be urged as a defense in the criminal proceeding.

3. Where a statute sought to be enjoined in the federal courts is other than a federal statute, the proper forum for the determination of its constitutionality is a court of the jurisdiction whose statute it is. A federal court is not a proper forum for the determination of the constitutionality of a non-federal statute.

4. An injunction may be had in a federal court against the enforcement of an unconstitutional state statute only where the circumstances are exceptional and there is a threat of irreparable, great and immediate injury as a result of the enforcement of the statute.

*A. F. of L. v. Watson,* 327 U.S. 582;
*Douglas v. Jeannette,* 319 U.S. 157;

*Williams v. Miller,* 317 U.S. 599;
*Watson v. Buck,* 313 U.S. 387;
*Beal v. Missouri P. R. Corp.,* 312 U.S. 45;
*Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89.

The fourth principle stated above is a development of the rule that "'equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property'" enunciated in *Tyson & Bro. v. Banton,* 273 U.S. 418, 428. *Cline v. Frink Dairy Co.,* 274 U.S. 445, 452.

Following the *Cline* case, the presently worded principle has been set forth in six supreme court decisions wherein a stay of the enforcement of a state statute was sought. In all, injunctive relief was denied. *A. F. of L. v. Watson,* 327 U.S. 582; *Douglas v. Jeannette,* 319 U.S. 157; *Williams v. Miller,* 317 U.S. 599; *Watson v. Buck,* 313 U.S. 387; *Beal v. Missouri P.R. Corp.,* 312 U.S. 45; *Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89.

In the most recent case, *A. F. of L. v. Watson,* it was found that the test for the exercise of equitable powers of the federal court to enjoin the enforcement of a state enactment had been met, but the district court was ordered to refrain from exercising these powers pending an interpretation of the questioned amendment to the state constitution by the state supreme court. A dissenting opinion found a want of jurisdiction in equity and a failure to meet the enunciated test.

In the other cases, relief was denied for lack of a proper factual showing necessary for the exercise of equitable powers of stay. There were no exceptional circumstances found in those cases wherein the enforcement of a state enactment threatened great, immediate and irreparable injury.

It is clear that the equitable test is strictly interpreted and rigidly required. Exceptional facts must be found to justify federal intervention.

**B. Statutory federal jurisdiction as basis for the exercise of equity powers to stay enforcement of unconstitutional state enactment.**

The fact that federal jurisdiction over the cause is had under statutory provisions does not affect the doctrine that prior to a federal court exercising equitable powers of intervention to stay enforcement of a state statute, proof must be had that the circumstances are exceptional and that a failure by the United States court to intervene will clearly and imminently be followed by irreparable injury.

In *A. F. of L. v. Watson, supra,* the jurisdiction of the federal court was found in Section 47(8) of Title 28 U.S.C. (proceedings arising under a law regarding commerce). In addition, a further finding was made that the facts were such as to warrant intervention to stay the enforcement of the state constitutional provision, but that federal action should be deferred until the challenged provision was first construed by the state courts. Jurisdiction under 41(8) did not suffice *per se* to permit intervention.

In *Douglas v. Jeannette, supra,* federal jurisdiction was based upon Section 41(14) of Title 28 (suits to redress deprivation of civil rights, the right which was threatened by state law arising under Title 8 U.S.C., Sec. 43, a civil rights act). Despite the jurisdictional basis, relief was denied.

In *Watson v. Buck, supra,* federal jurisdiction rested on Section 41(1) of Title 28 (a claim arising under federal law, *Gibbs v. Buck,* 307 U.S. 66). Injunctive relief was denied due to a failure of a ". . . claim showing that an injunction was necessary in order to afford adequate protection of constitutional rights . . . Such 'exceptional circumstances' and 'great and immediate' danger of irreparable loss were not here shown." 313 U.S. 387, 401.

In *Beal v. Missouri P. R. Corp., supra,* jurisdiction was grounded on diversity of citizenship (Tit. 28 U.S. 41(1)). No injunction was had because of the failure of proof of irreparable injury flowing from the threatened prosecution.

It is clear that whether the jurisdiction of the federal court over the cause is based upon the civil rights acts, diversity of citizenship provisions, or any other statutory basis, relief staying the enforcement of state statutes will be granted only where the equitable test set out for this type of case has been met.

*Hague v. C.I.O.,* 307 U.S. 496, is not to the contrary. There an injunction was sought against the enforcement of municipal ordinances prohibiting public assemblies without permits. The director of public safety

had discretion to refuse a permit to prevent disorderly assemblies. The course of conduct complained of consisted in an alleged conspiracy to keep labor unions out of the city. Persons distributing printed matter on the streets were arrested and forcibly removed beyond the city limits. Unlawful searches, arrests and prosecutions were had. Permits to hold public meetings were regularly denied. Jurisdiction of the cause was found in Tit. 28 U.S.C. Section 41(14) (denial of constitutional rights). No discussion is had in the case as to the propriety of the exercise of injunctive powers by the federal courts, although the facts do not permit of denial that unless such relief was granted great and immediate danger of irreparable loss would have occurred.[3] The circumstances were certainly exceptional.

The *Hague* case is not one involving the use of federal injunctive powers to stay the regular enforcement through legal channels of allegedly unconstitutional state enactments. It is rather a case involving an injunction against the irregular and extrajudicial enforcement of unconstitutional ordinances through strong-arm methods.

Other Supreme Court decisions requiring a showing of irreparable injury immediately consequent upon the enforcement of allegedly unconstitutional state enactments as a prerequisite for injunctive relief in the

---

[3]The situation has been described "The bill of complaint in the Hague case, whereby the jurisdiction was to be adjudged, fairly bristled with allegations of fact showing an arbitrary, discriminatory and even violent deprivation of complainants' freedom of speech, press and assembly, all done by municipal officers of Jersey City under color of enforcing a city ordinance." Dissenting opinion, *Douglas v. Jeannette,* 130 F. (2d) 652, 661.

federal courts, irrespective as to what the basis of federal jurisdiction may be, include:

*Spielman Motor Sales Co. v. Dodge,* 295 U.S. 89;

*Cline v. Frink Dairy Co.,* 274 U.S. 445;

*Tyson & Bro. v. Banton,* 273 U.S. 418;

*Packard v. Banton,* 264 U.S. 140.

**C. Restriction on federal courts exercising equity power to stay pending proceedings in state courts.**

Statutory limitations on the powers of federal courts to enjoin pending proceedings in state courts is of long standing. It first found expression in the Act of March 2, 1793, which supplemented the original judiciary act. It is there provided:

> ". . . that writs of ne exeat and of injunction may be granted by any judge of the supreme court in cases where they may be granted by the supreme court or circuit court; but no writ of ne exeat shall be granted unless a suit in equity shall be commenced, . . . nor shall a writ of injunction be granted to stay proceedings in any court of a state; . . ."
>
> (Act of March 2, 1793, Ch. 22, Sec. 5, 1 Stat. 334.)

The revision of 1878 continued the restriction with an exception provided for bankruptcy cases. In this form the enactment was retained through subsequent revision until 1948.[4] Other statutory exceptions to the

[4] "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy" (Sec. 720, Rev. Stat. 2 ed.). In 1911 this provision became Sec. 265 of the Judicial Code and later Sec. 379 of Tit. 28 of the U. S. Code.

blanket restriction against the federal courts interfering with state court proceedings by stays have been created. One such exception antedated the original act, the balance being subsequent thereto.

The original judiciary act of 1789 provided for removal of cases from state to federal courts with the responsibility in the state court from which a case was removed to proceed no further in the cause.[5] It has been consistently held that federal courts may, by virtue of this provision, enjoin state courts from continuing with proceedings after removal. *French v. Hay,* 22 Wall. 250; *Bondurant v. Watson,* 103 U.S. 281; *Kern v. Huidekoper,* 103 U.S. 494. An injunction could not be had, however, by the federal courts, against the continuance of state court proceedings, where removal was had to the federal courts primarily for the purpose of securing the injunction. *Dial v. Reynolds,* 96 U.S. 340; *Lawrence v. Morgan's Louisiana & T. R. & S.S. Co.,* 121 U.S. 634.

Additional statutory exceptions permitting the federal courts to issue stays against the continuance of state court proceedings exist by virtue of the Act of March 3, 1851, limiting shipowners' liabilities (9 Stat. 635, 46 U.S.C. Section 41(26) now contained in Tit. 38 U.S.C. Section 2361). *Dugas v. American Surety Co.,* 300 U.S. 414; *The Frazier-Lemke* Act (Tit. 11 U.S.C. Sec. 203(O)); *Kalb v. Feuerstein,* 308 U.S. 433; and the *Emergency Price Control Act,* 56 Stat. 23, 50 U.S.C. App. Supp. II, Section 901; *Bowles v. Willingham,* 321 U.S. 503.

---

[5]Sec. 12 of the Act of March 2, 1793, 1 Stat. at L. 73, 79.

Apart from statutory exceptions during the sixty-three year period from the revision of 1878 until the decision in *Toucey v. New York L. Ins. Co.,* 314 U.S. 118, the Supreme Court has passed upon the statutory restriction of the Judicial Code, Section 265, in some sixty-two cases, in the course of which certain apparent judicial exceptions were engrafted on that section.

In *res* cases, a federal court first acquiring jurisdiction of the *res* was permitted to protect its jurisdiction by restraining state court proceedings seeking to interfere therewith despite the prohibitions of Sec. 265. *Julian v. Central Trust Co.,* 193 U.S. 93; *Mandeville v. Canterbury,* 318 U.S. 47.

This apparent exception is based upon one of two theories. *Essanay Film Mfg. Co. v. Kane,* 258 U.S. 358, places it on the ground that the exception actually constitutes a compliance with the Code restriction, that is, it prevents friction between the federal and state court systems by eliminating simultaneous litigation by courts of both systems over the same subject matter.

> ". . . In exceptional instances the letter (of the Judicial Code, Sec. 265) has been departed from while the spirit of the prohibition has been observed; for example, in cases holding that, in order to maintain the jurisdiction of a Federal court, properly invoked, and render its judgments and decrees effectual, proceedings in a state court which would defeat or impair such jurisdiction may be enjoined. . . . The effect of this, as will be observed, is but to enforce the same freedom from interference, on the one hand, that is the

prime object of Sec. 265 to require, on the other. 258 U.S. 358, 361" (parentheses added).

A second basis of justification of this apparent exception rests upon Section 262 of the Judicial Code (28 U.S.C. 377) giving the federal courts power to issue all writs necessary for the exercise of their jurisdiction. In *Kline v. Burke Constr. Co.,* 260 U.S. 226, it was claimed that the use of injunction in these cases merely protected the jurisdiction of the federal courts.

A second apparent exception was had where a federal injunction was invoked to stay the enforcement of fraudulent state court judgments. *Simon v. Southern R. Co.,* 236 U.S. 115.

A question exists whether this rests on the theory that invalid state court proceedings are not statutory state court proceedings within the meaning of Section 265 of the Judicial Code, or whether this is a judicially legislated exception to that section. *Hill v. Martin,* 296 U.S. 393.

A third apparent exception, developed by the courts in relitigation cases (*Prout v. Starr,* 188 U.S. 537; *Julian v. Central Trust Co.,* 193 U.S. 93), was repudiated by a majority of the court in *Toucey v. New York L. Ins. Co.,* 314 U.S. 118, and *Southern Railway Co. v. Painter,* 314 U.S. 155, although subsequently restored as a legislative exception by the 1948 revision of the Judicial Code, 28 U.S.C. 2283.

The process of judicially engrafting exceptions to the prohibition of the Judicial Code, Section 265, was

brusquely checked by the Supreme Court in *Toucey v. New York L. Ins. Co., supra.* The question for consideration was whether a federal court could stay proceedings in a state court, the claim pressed therein having previously been decided adversely to the claimant in the federal court.

Mr. Justice Frankfurter, writing the opinion for the court, points out that a judicial exception was engrafted to the Act of 1793 in *res* cases, which exception was not only compatible with the principles and philosophy of the statutory restriction, but was firmly established and recognized by Congress when the Judicial Codes were revised. In relitigation cases, on the other hand, no such exception had been firmly established or recognized by Congress and should not be judicially recognized, such exception being violative of the Judicial Code, Section 265.

The tone and temper of the opinion is critical of attempts by federal courts to judicially legislate exceptions to the statutory restrictions.

> "We find, therefore, that apart from congressional authorization, only one 'exception' has been embodied in Sec. 265 by judicial construction, to wit, the res cases. The fact that one exception has found its way into Sec. 265 is no justification for making another." (314 U.S. 118, 139.)

The opinion concludes:

> ". . . We must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation." (314 U.S. 118, 141.)

Since the *Toucey* case, *supra,* Congress has created additional exceptions by virtue of the *Emergency Price Control Act,* 56 Stat. 23, and by the 1948 revision of the Judicial Code (Act of June 25, 1948, c. 646, 62 Stat. 869).

By revision in 1948, Section 2283, 28 U.S.C. now provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction or to protect or effectuate its judgments."

While the statutory revision does create an exception in relitigation cases denied as a matter of judicial interpretation of Section 265, Judicial Code, in the *Toucey* case, *supra,* and while it may restore "the basic law as generally understood and interpreted prior to the *Toucey* decision" (Revisers' Notes to 28 U.S.C. p. 1910, Section 2283; *First Nat. Bank & Trust Co. of Racine v. Village of Skokie,* C. A. 7, 173 F. (2d) 1), Congress has the power to restrict the exercise of jurisdiction by the lower federal courts as was stated in *Lockerty v. Phillips,* 319 U.S. 182, 187:

> "The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.' Cary v. Curtis, 3 How. (U.S.) 236, 245, 11 L.Ed. 576, 581, . . ."

The principle of the *Toucey* case, *supra,* that the courts of the United States may not carve judicial exceptions out of restrictions congressionally imposed is still sound law controlling upon this court as well as upon the trial court and on other federal courts. A federal court may not stay state court proceedings where not authorized so to do by Congress either by 28 U.S.C. Section 2283 or by other specific federal legislation.

**D. Legislative restriction on federal courts staying state court proceedings as a limitation upon jurisdiction or equity powers.**

Prior to *Smith v. Apple,* 264 U.S. 274, it was implicit in the supreme court decisions that the restrictive provision of Judicial Code Section 265 constituted a limitation on the jurisdiction of the federal courts. In *Diggs & Keith v. Wolcott,* 4 Cranch 179, it was expressly so held, and this holding was repeated in unmistakable language in *Ex parte Sawyer,* 124 U.S. 200, *Harkrader v. Wadley,* 172 U.S. 148, and *Ex parte Young,* 209 U.S. 123.

The question of *Smith v. Apple,* 264 U.S. 274, was whether an appeal from the refusal of a federal district court to enjoin a proceeding in a state court under Judicial Code Section 265 constituted an issue as to "the jurisdiction of the court", under the appeal statutes. The Supreme Court found it had no jurisdiction of the appeal, stating with respect to Section 265 (264 U.S. 274, 278-280):

> ". . . It is not a jurisdictional statute. It neither confers jurisdiction upon the district

courts nor takes away the jurisdiction otherwise specifically conferred upon them by the Federal statutes. It merely limits their general equity powers in respect to the granting of a particular form of equitable relief, that is, it prevents them from granting relief by way of injunction in the cases included within its inhibitions. In short, it goes merely to the question of equity in the particular bill. . . . This section, as settled by repeated decisions of this court, does not prohibit in all cases injunctions staying proceedings in a state court. Such injunctions may be granted, consistently with its provisions, in several classes of cases. . . . Necessarily, therefore, in a suit in equity of which a district court has jurisdiction under the Federal statutes, where the relief sought is an injunction against proceedings in a state court, it is the duty of the court to determine, under the allegations and proof, whether a case is made which entitles the plaintiff to the injunction sought; that is, whether the case presented is one in which such relief is prohibited by the statute, or one in which it may nevertheless be granted. . . . Where the plaintiff has the undoubted right to invoke its Federal jurisdiction, the court is bound to take the case and proceed to judgment. . . . And when the court takes jurisdiction and determines that, in the light of Sec. 265 of the Code, it is either authorized or prevented from granting the injunction prayed, its decision, whether the relief sought be granted or denied, is plainly not a decision upon a jurisdictional issue, but upon the question whether there is or is not equity in the particular bill, that is, a decision going to the merits of the controversy."

This interpretation that the restrictive provisions of Judicial Code Section 265 constitute limitations on general equity powers of federal courts rather than limitations of jurisdiction has been repeated in *Treinies v. Sunshine Min. Co.,* 308 U.S. 66, 74. The Supreme Court has never considered however that this limitation is such as can be waived by a federal court in its discretion upon finding a jurisdictional basis for the granting of the relief sought. At all times, the Supreme Court has held this limitation is an effective one barring relief calling for a stay of a state court proceeding. In other words, whether this limitation is upon jurisdiction or upon the equity powers of the court, the end result is the same and no injunction can be granted unless the case falls within an exception to the prohibition of Section 265. In *Hill v. Martin,* 296 U.S. 393, 403, Mr. Justice Brandeis, having previously cited *Smith v. Apple, supra,* points out:

> ". . . the prohibition (of Sec. 265) applies whatever the nature of the proceeding, (in the state court) unless the case presents facts which bring it within one of the recognized exceptions to Section 265." (Parentheses added.)

In the *Toucey* case, the Court quotes from *Smith v. Apple* (314 U.S. 118, 130 n. 2) and thereafter sanctions federal court intervention staying state court proceedings only in those cases falling within the statutory exceptions to Section 265 and in the *res* cases.

If the injunctive relief prayed for in the federal court calls for a stay of a state court proceeding, and the case does not fall within a statutory exception, or is not a *res* case, then Section 265, irrespective of any equities raised by the case, constitutes an effective restriction against the issuance of such a stay. To hold otherwise would permit a federal court to stay state court proceedings whenever the equities presented were strong, and thus exception upon exception to the statutory prohibition would be created.

Contrary to these decisions, the court below proceeded on the theory that the statutory restriction being, not upon the jurisdiction of the court, but upon the exercise of equitable powers, the restriction had no greater effect than the basic limitation against the granting of equitable relief in cases where an adequate remedy exists at law, the determination of the adequacy of the legal relief being for the equity court. The approach of the trial court is that the matter falls purely within its discretion and the weight of the equities may overbalance the restrictive provisions of the section and permit the court, in consequence, to stay court proceedings in other than the federal courts. Having jurisdiction under the Civil Rights Acts, the court feels it may exercise jurisdiction and protect it by staying the proceedings in the territorial courts, provided the factual basis for equitable relief exists. The restrictions of Section 265 go merely to the question whether the court should exercise its equity powers (R. 469).

Reliance is placed by the court on the case of *Keegan v. State of New Jersey,* 42 F. Supp. 922, 924.

enforcement of the statute may result in the deprivation of civil rights provided by federal statute or the Constitution of the United States does not alter this rule. That the prosecution involves exceptional circumstances and will result in a great and immediate danger of irreparable loss does not alter this rule. A combination of these factors does not alter this rule.

Except where Congress has expressly permitted federal courts to enjoin proceedings in state courts, they may not do so.

Since, however, there are no restrictions upon a federal court staying enforcement proceedings under a state criminal statute, prior to the time that the enforcement procedure has advanced to the stage of becoming "proceedings in a court of a state", assuming, always, the proper federal jurisdictional basis is had and the case presents the requisite "exceptional circumstances", injunctions have been permitted to be issued out of United States courts to stay the enforcement of threatened prosecutions of allegedly unconstitutional state criminal statutes. The distinction is between "threatened" criminal prosecutions, which may under proper circumstances be enjoined by federal courts, and "pending" criminal prosecutions, which may be enjoined, only where specifically so provided by federal statute.

*Parkersburg & O. River Transp. Co. v. Parkersburg,* 107 U.S. 691, is the first case in which the Supreme Court made this distinction. The Transportation Company filed a bill in the federal courts in

West Virginia to restrain proceedings commenced in the state courts by the City of Parkersburg for the collection of wharfage. It was claimed by the Transportation Company that the ordinance under which the City was proceeding was unconstitutional. In its opinion, the court passed on Section 720 of the Revised Statutes (later Section 265 of the Judicial Code) and states:

> "If the 720th section of the Revised Statutes, which declares that 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State,' applies to suits originally brought in the circuit courts by virtue of the Act of March 3, 1875 (18 Stat. at L., 470), in cases arising under the Constitution or laws of the United States, it is clear that so much of the bill in this case as prays for an injunction to restrain legal proceedings already instituted before the recorder of Parkersburg before it was filed, cannot be maintained. But that portion of the bill which seeks to have the wharfage ordinance declared void, and to restrain any further collections under it, and any further interference with the right of the complainant to the free navigation of the Ohio River, is not open to this objection, . . ."
>
> *Parkersburg & River Transp. Co. v. Parkersburg,* 107 U.S. 691, 711.

In *Ex parte Young,* 209 U.S. 123, the Supreme Court did not pass upon the statutory restriction as such, but considered the general problem of federal courts enjoining state court proceedings, and arrived at the same result.

> "It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings by indictment or otherwise, under the state law. This, as a general rule, is true but there are exceptions. when such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a Federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed . . . But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court."
>
> *Ex parte Young,* 209 U.S. 123, 161-162.

The leading case on the subject is *Cline v. Frink Dairy Co.,* 274 U.S. 445. A prosecution was commenced and others threatened for violations of state and anti-trust law. An injunction against the prosecutions was sought in the federal courts on the ground that the statute was unconstitutional. The three-judge district court entered a permanent injunction. A dissent was filed, in which it was contended that the threatened actions could be restrained, but the pending actions in the state court could not be enjoined because of the restrictive provisions of the federal statute, 9 F. (2d) 176, 182. The Supreme Court states very tersely on this point, 274 U.S. 445, 452-453:

> "It is objected, however, that the injunction can not be supported under the authorities, in so far

as it is directed against actual proceedings pending in criminal court. One of the district judges below dissented from this part of the decree. Of course, the injunction is not only against a multiplicity of future suits and the threatened proceedings for forfeiture, by which the attorney general proposes to end the businesses of all the plaintiffs, and the objection would only lead to a narrowing of the decree. . . .

" '. . . But the Federal Court can not, of course, interfere in a case where the proceedings were aleady pending in a state court. Taylor v. Taintor, 16 Wall. 366, 370, 21 L. ed. 287, 290; Harkrader v. Wadley, 172 U.S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.'

"We therefore agree with the view of the dissenting judge that the injunction is too broad, in so far as it restrains proceedings actually pending, and that it must be accordingly modified."

The rule of the *Cline* case has been recognized and followed by this court in *Babcock v. Noh,* 99 F. (2d) 738, as well as by the Eighth Circuit in *Smith v. Dudley,* 89 F. (2d) 453, by a three-judge district court in *Society of Good Neighbors v. Groat,* 77 F. Supp. 695, and by single district court judges in *Mickey v. Kansas City, Mo.,* 43 F. Supp. 739, and *Priceman v. Dewey,* 81 F. Supp. 557. This rule is based on logic and common sense. An injunction against a threatened prosecution does not stay a proceeding in a state court but *in limine* prevents such proceeding from getting into the state court. A pending proceeding, to the contrary, is clearly a proscribed "proceeding in a state

court", the stay of which by a federal court is prohibited.

*A. F. of L. v. Watson,* 327 U.S. 582, is not contrary. The State Attorney General, according to the petitioner's pleading, had instituted quo warranto proceedings against employers who had closed shop contracts with the petitioning union, to enforce provisions of the state constitution prohibiting discrimination against employees because of membership or nonmembership in labor unions. The threat of a multiplicity of actions was also alleged. The three-judge district court dissolved the temporary injunction on grounds other than the application of Section 265 of the Judicial Code to pending criminal prosecutions. The point was apparently not raised and was not discussed by either the trial court or the Supreme Court. The pending, as opposed to the threatened prosecutions were relatively few and insignificant. The general enforcement of the constitutional provision was the matter of prime concern, both to the state and to the union. The case did not pass upon the question of the propriety of a United States court enjoining pending criminal proceedings in a state court and therefore did not in any way modify the ruling previously enunciated in the *Cline* case.

In every case, therefore, in which the issue has been squarely raised, the courts have held that the federal courts may not stay pending criminal proceedings due to the prohibitions contained in Section 265 of the old Judicial Code (now Section 2283 of Title 28 U.S.C.).

The fact that rights arising under the Civil Rights Act may be involved and jeopardized in the pending criminal prosecutions does not of course alter the principle or its application. Neither the Civil Rights Act nor Section 265 of the old Judicial Code provided any exceptions in Civil Rights cases to the restriction against federal courts staying pending proceedings in state courts.

On many occasions this court and other federal courts have recognized the applicability of Section 265 to Civil Rights cases and have refused to grant relief which would require staying state court proceedings. *Aultman & Taylor Co. v. Brumfield,* 102 Fed. 7, appeal dismissed, 22 Sup. Ct. 938, 46 L. ed. 1265; *Mickey v. Kansas City, Mo.,* 43 F. Supp. 739; *Atlantic Fisherman's Union v. Barnes,* 71 F. Supp. 957; *Babcock v. Noh,* 99 F. (2d) 738; *Society of Good Neighbors v. Groat,* 77 F. Supp. 695.

The present Section 2283 of Title 28 permits United States courts to grant injunctions to stay state court proceedings only where authorized by Congress, where necessary in aid of jurisdiction, or to protect or effectuate judgments. Civil Rights cases fall into none of these categories. They are not exempted by Act of Congress from the limitations of Section 2283. Section 2283 itself does not provide for injunctions in such cases. Since pending criminal proceedings necessarily antedate federal action, there is no question of preserving the jurisdiction of federal courts, the matter first having come within the jurisdiction of the state court.

Similarly there is no question of protecting or effectuating a judgment of the federal court, there being no federal court judgment to be protected or effectuated when the stay is sought in the federal court against the continuance of the pending state court criminal proceedings.

As Section 2283 does not provide for stays against state court proceedings in Civil Rights cases, and as no other federal act makes any exceptions to the prohibitions of Section 2283 in these cases, an injunction cannot be granted, the federal courts being without power to make any further exceptions to the restrictions of that section. *Toucey v. New York L. Ins. Co., supra.*

**F. Application of Section 2283 to the courts of the Territory of Hawaii.**

Section 2283 of Title 28 is a limiting provision on the federal courts in their relationship with state courts. Neither in 2283, nor in the acts from which it has been derived, is mention made of any courts other than state courts as coming within the protective provisions of freedom from intervention by the federal courts. It is extremely doubtful whether the word "state" as used in this and predecessor enactments includes within its scope "territories".

The legislative history of the initial enactment in 1793 (Act of March 2, 1793, Ch. 22, Sec. 5, 1 Stat. 334) is shrouded in darkness, no record of any debates on the Act being extant, and the theories of its enactment being diverse, *Toucey v. New York L. Ins.*

*Co.,* 314 U.S. 118, 131; Warren, *Federal and State Court Intervention,* 43 Harvard Law Review, 345.

While on occasion "state" in federal statutes has been held broad enough to encompass territories, *Talbott v. Silver Bow County Comrs.,* 139 U.S. 438, in the absence of a clear legislative intent that territories shall have this coverage, it has generally been narrowly confined, *Downes v. Bidwell,* 182 U.S. 244; *Territory of Alaska v. Troy,* 258 U.S. 101; *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368.

While no definitive judicial determination has been given of the meaning of the word "state" in Section 2283 or predecessor enactments, it is significant that the judiciary act of 1789, to which the original act of 1793 is amendatory, has been interpreted by the Supreme Court, which has held that the provisions dealing with the selection of juries, applies only to states and not territories, *Clinton v. Englebrecht,* 13 Wall. 434. Likewise under the same act it was held that a citizen of the Territory of Mississippi was not a citizen of a state within the diversity of citizenship provisions, *New Orleans v. Winter,* 1 Wheat. 91, following Chief Justice Marshall's opinion in *Hepburn v. Ellzey,* 2 Cranch 445, "that the members of the American Confederacy are only the states contemplated in the Constitution". If, following Marshall, "state" is used in the judiciary act as the term is used in the Constitution, then logically it should have the same meaning in this enactment supplementing the judiciary act. As such, territories would not come within its purview.

The care with which the words "state" and "territory" are used in the Judicial Code adopted in 1911 (Act of March 3, 1911, 36 Stat. 1087, et seq.) and particularly Section 249 thereof, providing that writs of error and appeals should not be affected by the admission of any "territory" as a "state" after judgment or decree (with an eye particularly to Arizona and New Mexico, and then admitted as states), further indicates that "state" as used in Section 379 of Tit. 28, U.S.C., is not intended to include territories.

The similar nice use of the word "territories" in various sections of the Revision of 1948 (e.g., the inclusion of citizenship in territories as a basis for diversity of citizenship for jurisdiction in the federal courts, Section 1332), shows a clear legislative intent that "states", were not otherwise qualified, should not include territories. See also Section 1738 and *Stainback v. Mo Hock Ke Lok Po, supra,* holding "state" in Section 2281 and 2284 does not include territories.

But apart from the language of the Judicial Code, which does not prohibit federal courts from staying proceedings in territorial courts as it does in state court proceedings, the courts of the Territory of Hawaii have, by virtue of the Organic Act of the Territory, been placed in the same position as state courts in relation to the federal court system, and consequently, while the provisions of Section 2283 are not *per se* applicable to territorial courts, that section, taken with the provisions of the Organic Act, require that the restriction on federal courts enjoining non-federal court proceedings include within its protec-

tion, the courts of the Territory of Hawaii. This analogous position of the courts of the Territory of Hawaii and the courts of the various states with relation to the federal court system has been recognized by this Court in the recent case of *Alesna v. Rice,* 172 F. (2d) 176, 179, and on many occasions by the United States Supreme Court, *Equitable L. Assur. Co. v. Brown,* 187 U.S. 308; *Ex parte Wilder Steamship Co.,* 183 U.S. 545; *Wilder's S. Co. v. Hind,* 108 Fed. 113.

The recognition by Congress of the organized state of the judiciary in the then Republic of Hawaii,[6] and its intent to preserve that system and to coordinate it with the federal judicial system in the same relationship as existed between the courts of the various states and the courts of the United States, is evident by the language of the Organic Act itself. Section 86(d) (48 U.S.C. Section 645) provides *inter alia:*

> ". . . The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. . . ."

---

[6]The Committee on Territories of the House of Representatives, upon receipt of a report from the Judiciary Committee of the Hawaiian Commission, in which the then existing Judiciary of the Republic of Hawaii was described, reported: "In view of the foregoing report it must be considered wise and safe to provide for the organization of the Territorial Courts of the Territory of Hawaii by substantially continuing them as now existing under the Republic of Hawaii and this has been done in the present bill." Report on H.R. 2972 from Committee on Territories, 56 Cong., 1st Sess., Report No. 305.

It is to be observed that the Organic Act as originally enacted, not only created the aforementioned relationship between the United States courts and the territorial courts, but the recognition of the territorial court system as one completely independent of the lower federal courts and completely analogous to the state court systems, is clear from the fact that, unlike any other territory of the United States, cases could be taken from the territorial Supreme Court, as from the highest court of a state, to the Supreme Court of the United States, only by writ of error, and only when a federal question was involved. No appeals such as could be had from the highest court of other territories could be had either in the United States Supreme Court or to any other federal court.

It was not until the Territory was five years old that any changes were made in this appellate procedure. In 1905, the appeal provisions were amended (33 Stat. Ch. 1465, Section 3), to permit appeals as well as writs of error to the United States Supreme Court in cases involving $5,000.00 or more, as well as in cases regarding federal questions.

These amendatory provisions were incorporated in Section 246 of the Judicial Code of 1911 (36 Stat. 1158), which declared that the appellate procedure to be followed in the United States Supreme Court from final judgments and decrees of the territorial Supreme Court should be prosecuted "within the same time, in the same manner, under the same regulations, and in the same classes of cases in which writs of error and appeals from the final judgments and de-

crees of the highest court of a state in which his decision in the suit could be had . . ."

These provisions were retained in the amendment of 1915 (38 Stat. 804), which added provisions for taking cases from the territorial to the federal Supreme Court by *certiorari* and from the territorial Supreme Court to the Circuit Court of Appeals by appeal and error where the amount involved was $5,000.00 or over.

It was not until 1925 that the immediate appellate relationship between the territorial and United States Supreme Courts, permitting direct review by the latter over the decrees and decisions of the territorial Supreme Court, was terminated (Act of February 12, 1925, Ch. 220, 43 Stat. 890).

At the time of annexation, Congress found an independent organized judicial system in the Republic of Hawaii, and provided for its maintenance in a manner completely analogous in all respects to state court systems. In this regard the Territory of Hawaii was unique among territories upon annexation to the United States. The relationship of its courts to federal courts was at that time identical to the relationship between state and federal courts.

There can be no serious question but that in 1911, when the Judicial Code was revised, Section 265 thereof, prohibiting federal courts from issuing stays against proceedings in state courts, was to be read in connection with Section 246 of the Judicial Code dealing with the direct review by the United States Su-

preme Court of territorial court decrees and decisions in other cases where similar review could be had of the highest courts of the states, and in addition Section 265 of the Judicial Code was to be read in connection with the provisions of the Organic Act requiring the application of the laws of the United States relating to matters and proceedings between the courts of the United States and the courts of the several states as governing between the courts of the United States and the courts of the Territory of Hawaii.

Since that time, there has been no modification of the provision of the aforementioned provision of the Organic Act, and the same construction must be given to Section 2283. That section, taken with the Organic Act, clearly protects territorial courts as state courts are protected from federal court intervention in federal cases.

The several states of the union, in the exercise of their governmental functions, are protected against interference by federal courts in two respects: (1) The courts of the states are free to hear pending cases before them without interference by the courts of the United States; (2) where federal judicial interference is permissible to stay the enforcement of state statutes, such interference can only be had upon consideration by a federal district court composed of three judges (28 U.S.C. Sections 2281 and 2284). This latter provision was in its original form (Judicial Code of 1911, Section 266) passed by Congress to correct the abuses found to be existent in the inter-

vention and interference with the enforcement, operation and execution of state statutes by hasty or improvident action of a single federal court judge.[7]

Both of these preventive provisions against interference by federal courts in state activities, basic minimal essentials for the protection of states, have been found absolutely necessary for the preservation of the independence of the sovereign states and for the minimizing of friction between the state and federal court systems.

By the *Stainback* case, it has been held that the three-judge district court provisions now contained in Sections 2281 and 2284 are not applicable to the Territory of Hawaii because the wording of the statute does not permit of coverage of territories along with states, because the statute imposes a burden on the federal judiciary both at the levels of circuit courts and of the Supreme Court and is, consequently, to be narrowly construed and its provisions strictly confined, and because the Territory of Hawaii does not have the sovereignty of a state and is subject to direct legislative control by the Congress of the United States. The result of this decision is to place the

[7]The abuses in the intervention by federal courts to stay the enforcement of state statutes became of such concern to Congress that in 1910 an amendment to the Judicial Code was adopted by the House of Representatives to take from federal district courts jurisdiction of suits "to suspend, enjoin or restrain the action of any official of a state, upon the ground of the unconstitutionality of such statute" (46 Cong. R. 313 (1910)). It failed to pass the Congress. However, in the same year, by amendment to the Mann-Elkins Act, three judges were required to sit in a suit praying for an interlocutory injunction to stay the enforcement of state statutes (Act of June 18, 1910, Sec. 17, 36 Stat. 539, 557).

Territory of Hawaii in a position where it may be subjected to the abuses Congress found to exist at the time of the enactment of the three-judge court provision in the Judicial Code.

Having so exposed the Territory to the possible hasty or improvident action of a single federal court judge upon the constitutionality of a territorial statute, it is imperative that the Territory and its courts be given that protection afforded to the states, in prohibiting such a single judge from interfering with pending cases in territorial courts. In other words, if it is felt necessary that a three-judge federal court should be prohibited from staying proceedings in a state court, *a fortiori* a single judge sitting in the district court, susceptible to improvident or hasty action, should be prohibited from staying proceedings in a territorial court. Stripped of both of these protections, the territorial courts would necessarily lose their independence and integrity and would become merely adjuncts of the federal court system. This certainly was never intended by Congress, and the result should not be attempted by judicial construction.

The protective provision of Section 2283 does not rest upon sovereignty. It is not concerned with any federal legislative control that may be had over the jurisdiction in which the court sits. It rests solely upon the protection any judicial system requires for its existence.

This was recognized by the Supreme Court in the early case of *Peck v. Jenness,* 7 How. 612, where Mr.

Justice Grier traces the rule of comity between court systems, codified into a rule of positive law by the Act of 1793, back to the case of *Kennedy v. Earl of Cassilis,* 2 Swanst. 313, wherein Lord Eldon reversed himself and dissolved an injunction to restrain proceedings in a Scottish court. Such comity between court systems, even apart from statutes, is absolutely essential to maintain the independence of each and to prevent friction between them, *Western Fruit Growers v. U. S.,* C.C.A. 9, 124 F. (2d) 381.

It is therefore submitted that by juxtaposition of Section 2283 and Section 86(d) of the Organic Act, the prohibition against federal court intervention by stay in state court proceedings is to be extended to similarly protect pending proceedings in the courts of the Territory of Hawaii, that in all respects Section 2283 is equally applicable to the courts of the Territory of Hawaii and to the several states, and that the federal courts may not intervene in any territorial court proceedings. As a consequence, the trial court, in assuming the power to stay proceedings in the territorial circuit courts and proceedings before the Grand Jury of the County of Maui, committed reversible error. It is therefore submitted that this Court should remand the cases to the United States District Court for the District of Hawaii for the dissolution of the stays previously issued, and for the dismissal of the actions.

## II.

### CRITICISM OF THE COURTS AND LACK OF SUPPORT IN THE RECORD OR IN FACT OF ANY INFERENCE THAT THE TERRITORIAL JUDICIAL SYSTEM IS NOT ADEQUATE TO AFFORD FULL REDRESS FOR ANY DEPRIVATION OF RIGHTS.

Because of the peculiarly defenseless position of judges when subjected to attack, it is deemed to be the responsibility of The Bar Association of Hawaii, in compliance with the precepts of the *Canons of Professional Ethics,* to support the judges of the Territory of Hawaii against any improper criticism of them that may either advertently or inadvertently have crept into the decision of the court below. To that end, this section of the brief will be devoted, to an analysis of those portions of the opinion of the trial court which might be regarded as being unfairly critical of the judges of the territorial courts, and to clarify the record in this respect.

This portion of the brief is not directed to any criticisms that may have been made of the prosecuting officers of the Territory of Hawaii, except to the extent that such criticism might be so intrinsically connected with that of the courts that they must be considered as an integral whole.

#### A. The approval by the territorial courts of private counsel acting as prosecuting officers, particularly in labor cases.

In its analysis of the 1924 strike of the Filipino laborers and the riot in which four policemen and sixteen laborers were killed, and the ensuing prosecution under the territorial *Unlawful Assembly & Riot*

*Act,* the trial court purports to take judicial notice of the "arcing of law enforcement from the regularly constituted territorial authorities to prosecuting attorneys employed . . . by the planters", the approval of these practices by the territorial courts, and the fact that the practice of private prosecutors representing the Territory has occurred most frequently in criminal cases growing out of labor disputes (R. 388-389).

There is nothing in the record before this Court dealing with the Filipino strike which occurred twenty-five years ago. The finding of the court below must rest, as the opinion has indicated, only upon judicial notice.

The inference that might be drawn from the cited passages of the opinion is that in the Territory of Hawaii the criminal law has been, and is being, administered for the private ends of the plantations through the conduct of the prosecution of criminal cases in which the plantations are complainants, by private counsel, and that all of this has occurred with the approval of the territorial courts.

There is no evidence in the record to support this conclusion. It is not justifiable on any basis of judicial notice, because it is submitted that such facts are neither notorious nor existent.

This Court will notice that, of the three judges sitting in the court below, only one is a resident of Hawaii. The other two judges have very limited personal knowledge on the subject of the conduct of trials in the territorial courts. The method by which they

were informed as to the practices of those courts does not appear in the record before this Court. To the contrary, the record before this Court shows that in all of the prosecutions in the territorial courts which were sought to be enjoined in this action, or which were related to this action, prosecutions were conducted solely by government counsel.

Those matters of which judicial notice may be taken, must of necessity be matters of common or general knowledge, well and authoritatively settled, and not doubtful or uncertain, *Werk v. Parker,* 249 U.S. 130; *Waters-Pierce Oil Co. v. Deselms,* 212 U.S. 159; *Dominion Hotel v. Arizona,* 249 U.S. 265. The facts herein referred to, of which the court below took judicial notice, do not comply with this standard in any respect. Certainly the record in this case and the history of the Courts of the Territory of Hawaii do not justify the conclusion that the territorial courts approved any "arcing of law enforcement from the regularly constituted territorial authorities to prosecuting attorneys employed . . . by the planters."

The matter of private counsel prosecuting criminal cases was first directly brought to the attention of the Supreme Court in the case of *Woodward v. Republic of Hawaii* (1896), 10 Haw. 416, a seduction case. It was contended that the case was not prosecuted by the authority of the Republic, being prosecuted by private counsel, and it not appearing of record that the prosecution was authorized by the Attorney General. Under the facts the Court presumed the Attorney General's authorization.

A more complete consideration of the question was had in *Territory of Hawaii v. Chong Chak Lai,* 19 Haw. 437, a case in which counsel for the Chinese Consul, the prosecuting witness, appeared as associate counsel in the prosecution. In construing the statute relating to the duties of the Attorney General and the rights of private attorneys,[8] the court, after reviewing cases in other jurisdictions, found that the territorial statutes permitted private counsel to appear as assistant counsel for the prosecution. The court states with respect thereto:

> ". . . The attorney general and his deputies are required to appear for the Territory in all public prosecutions and are responsible on their oaths of office for the performance of their duties without fee or reward. They cannot delegate the performance to private persons nor is this done by permitting an attorney employed by private persons to assist in trials. The attorney general does not thus relinquish his control over a case. It would be the duty of the court to restrain any exhibition of spite or any attempt at persecution on the part of counsel so engaged. The public conscience would quickly be aroused by any appearance of administering the criminal law for merely private ends."

---

[8]Sec. 1551, Revised Laws of Hawaii, 1905: "He (the Attorney General) shall not receive any fee or reward from or in behalf of any person or prosecutor, for services rendered in any prosecution . . . to which it shall be his official duty to attend; . . ." (parentheses added) (presently contained in Revised Laws of Hawaii, 1945, Sec. 1506). Sec. 1700, Revised Laws of Hawaii, 1905, provides that attorneys shall have the right to practice in all courts of the Territory "for the prosecution or defense of actions, civil, criminal or mixed . . ." (now contained in Sec. 9708, Revised Laws of Hawaii, 1945). Also considered was Sec. 1546, Revised Laws of Hawaii, 1905 (now 1501, Revised Laws of Hawaii, 1945).

The cases of *Territory of Hawaii v. Robello,* 20 Haw. 7, and *Territory of Hawaii v. Soga,* 20 Haw. 71, also touch upon this problem.

Thus, the territorial courts have approved participation by private counsel in the prosecution of criminal cases, only where the proper prosecuting officers do not relinquish control of the case. This view appears to have been adopted by the majority of the American jurisdictions, *Ates v. State,* 141 Fla. 502, 194 So. 286, *People v. Lee,* 368 Ill. 410, 14 N.E. (2d) 498, as well as having been recognized as a proper principle by the federal courts, *Krotkiewicz v. U. S.,* 19 F. (2d) 421, C.C.A. 6. It is regarded as improper, of course, for the prosecuting officers to be superseded by private counsel and for the control of the case to pass out of the hands of government attorneys, *Perry v. State,* ..... Okla. ....., 181 P. (2d) 280, a view consistent with that expressed by the territorial Supreme Court in the *Chong Chak Lai* case.

There is nothing appearing in the record of the instant case to indicate that in any of the prosecutions referred to, or in any case in the Territory of Hawaii in which private counsel have associated in the prosecution, the Attorney General or other prosecuting officer has in dereliction of his responsibilities abdicated and turned the control of the case over to private counsel. There is certainly nothing in the record of this case or in the records of the territorial courts to indicate that if such had occurred it would receive the approval of the courts. To the contrary, the Supreme

Court is on record with language which would disapprove such practice.

In passing, it should be observed that it has been further found by the court below, again based upon facts found to be "notorious" and thereby forming a basis for judicial notice of them, that the practice of private counsel prosecuting criminal cases has occurred most frequently in cases growing out of labor disputes. It is also intimated that this practice is one of frequent occurrence. Again no evidence supports this finding or conclusion, and it is submitted the facts in this respect are not only not notorious, but to the contrary appear to be non-existent. A review of the criminal cases in the territorial Supreme Court indicates that private counsel have not appeared for the Territory in the last fifteen years, and over a period of twenty-five years such appearances have occurred three times: *Territory v. Miyamoto,* 29 Haw. 685, involving a prosecution for embezzlement, *Territory v. Chun Yun,* 33 Haw. 109, a proceeding upon a bond to keep the peace; and *Territory v. Comacho,* 33 Haw. 628, a prosecution for criminal trespass. None of these cases was apparently connected with labor disputes.

It is therefore submitted that the Court's finding that there has been, with the approval of the territorial courts, an "arcing" of law enforcement from the territorial prosecuting authorities to plantation attorneys, is not founded upon any evidence in the record, does not have the requisite factual basis from which the court might make a finding based on judicial no-

tice, and to the contrary, is opposed to the facts as they exist in the courts of the Territory of Hawaii.

It is submitted that, in fairness to the courts of the Territory, the record should be corrected in this respect.

**B. Criticism directed to the fixing of excessive bail.**

In the course of its opinion, the court below found that the bail required of the defendants in certain territorial labor cases arising out of strikes was excessive. Standing alone, such a finding might not reasonably be regarded as a criticism of the territorial courts or any judge thereof. However, this finding is placed in a context which carries implications impugning the integrity of territorial courts.

The court below finds the excessive bail so fixed in these labor cases a "pertinent fact" which, taken with other facts, leads it to the conclusion that "the criminal proceedings complained of are being carried on for the purpose of an attack upon a labor movement rather than for the ends of justice" (R. 479-481).

The propriety of a federal court interfering in territorial court proceedings has previously been discussed. No consideration is to be given herein to the very important further question of the propriety or impropriety of a federal court reviewing in collateral proceedings the amount of bail set by a territorial judge.

This portion of the brief is directed solely to the question of the integrity of the judges of the courts of the Territory, and to any suggestions as might be con-

tained in the opinion of the court below that any judges of the territorial courts participated knowingly with or cooperated in any attempt to use the processes of law for other than the ends of justice. It is the contention herein advanced that any such charges are not supported by the record in this case.

Irrespective as to whether the bail fixed in the territorial courts was or was not excessive, it should be noted that the court below, in making its determination that the bail was excessive, did not apply the standard criteria used in such cases. The court was clearly influenced by its determination that the Territory of Hawaii is geographically isolated and that there is "but little chance for a defendant to escape" therefrom (R. 409-410).

It is to be observed that habeas corpus will not lie in the federal courts in a case where excessive bail has been set when the petitioner has actually posted the required bail, *Johnson v. Hoy,* 227 U.S. 245. Consequently a petition of habeas corpus would not have been had in the court below under the circumstances here existing. It should also be observed that the record shows no application by any of the defendants for reduction in bail either in the territorial courts or in the court below.

Any consideration of the question, therefore, constitutes a purely collateral review of the initial determination of the territorial court judge. The finding of the court below that the bail set in the territorial cases was excessive is purely gratuitous and apparently made solely for the purpose of establishing facts

justifying intervention by the federal court in territorial judicial proceedings.

Because the amount of the bail was not challenged in the territorial courts, but was posted on behalf of the individual defendants in those cases by the I.L.W.U., the court below has given no consideration to the ability of the individual defendants to make the required bail or to have the bail made for them. This is one of the most important factors to be considered by a court fixing the amount of bail and a court reviewing such determination. *Bennett v. U. S.,* 36 F. (2d) 475, C.C.A. 5.

While some consideration was indirectly given to the nature of the offense with which the individuals were charged, nothing was mentioned concerning the penalty for the offenses charged, the character and reputation of those accused, and the character and strength of the evidence against them, all factors obviously of great importance for a review in excessive bail cases. (72 A.L.R. 801, et seq., *Factors in Fixing Amount of Bail in Criminal Cases.*)

The chief emphasis in the finding that the bail is excessive rests on the isolation of the Territory of Hawaii. This finding is, of course, completely unrealistic in the middle of the Twentieth Century. With regularly scheduled airplanes, as well as those available for charter, flying between the Islands and the Mainland, any statement as to territorial isolation is slightly anachronistic. In less time than that required to go by train from Boston, Massachusetts, to Washington, D. C., or from Los Angeles to San Francisco,

passage can be had from Honolulu to the West Coast. Consequently, any statement that there is little chance for a defendant under bail to escape from the Territory of Hawaii because of geographic isolation is not to be given excessive weight.

The review by the court below of the fixing of bail by the territorial courts was irregularly undertaken, perfunctorily investigated, and then broadly condemned. The court below, with little actual knowledge of existing conditions in the Territory, without hesitancy and on the basis of an obvious misconception, substitutes its judgment on what should constitute a reasonable amount of bail in these cases, for that of the trial court. There is no evidence that factors considered by the trial court in determining its figures, which figures were not challenged in the territorial courts, were considered by the court below.

It is, therefore, submitted that in view of the suggestion by the court below that excessive bail so found by it was a factor leading to the conclusion that criminal proceedings in the territorial courts were being carried on for the purpose of an attack upon a labor movement, rather than for the ends of justice, this court should correct the record in this respect and, without conceding the validity of the suggestion of a dereliction of duty or venality of motive, that may or may not be attributable to the prosecuting authorities of the Territory of Hawaii, it should be found by this court that the record is bare of evidence of any misuse of the legal process by the judges and the courts of the Territory.

**C. Other instances of apparent censure of the courts of the Territory of Hawaii.**

Because of the serious suggestions made concerning the territorial courts in the two respects previously considered, other criticisms of the courts and judges contained in the opinion similarly denote that the court below may have imputed to them motives or conduct not in conformity with the high traditions of our judiciary. This is particularly so in view of the court's finding that the "*mores* of their (the Attorney General and Maui prosecutors) time and locality" have affected the motives of the Attorney General and prosecuting officers of Maui County in the performance of their duties and have led them to use the legislation under consideration as a club to beat labor.

In considering the proceedings on the challenges to Grand Jury in Criminal Numbers 2412 and 2413 before late Judge Albert M. Cristy,[9] a citicism was directed toward Judge Cristy for permitting only a limited review of the methods of selection of the Grand Jury, the qualification of those members, and the Judge's basis for such limitations. In addition, the court below states:

> ". . . Judge Cristy also excluded evidence which, from the nature of the offers made, would have tended to show more clearly that certain important elements of the community were precluded from serving on the Grand Juries of Maui

[9]This distinguished jurist died July 11, 1949, after a memorable judicial career, singularly marked by an unselfish devotion to the discharge of the duties of his office.

> County. The Court, however, permitted enough evidence to come into the record to demonstrate the erroneous method employed in selecting the 1947 Maui County grand jury." (R. 498.)

and further stated:

> ". . . The testimony received by Judge Cristy, however, makes it clear, . . . that the exclusion of certain groups of the community was deliberate and intentional." (R. 503.)

If this language, in the light of the entire opinion, should be construed to mean that motives other than those which should properly inspire a trial judge in making his rulings governed Judge Cristy in the handling of this case, then, it is submitted that this language of the court below should be set aside and corrected. There is certainly nothing in the record that would justify any such conclusion, and the background and experience of this judge would refute any notion that he was motivated in any of his judicial actions by the so-called *mores* of the community to dispense other than absolute justice.

If the language previously quoted is not intended to convey any impressions critical of the integrity of Judge Cristy, then it is submitted that the ambiguity that presently exists in the language of the opinion of the court below should be clarified by this Court in the face of the clear record on the matter.

## CONCLUSION.

The equitable power of the United States District Court for the Territory of Hawaii to stay criminal proceedings pending in the territorial courts has not been properly exercised in this case insofar as a basis for the exercise of such power is bottomed on the inadequacy of the territorial court system. Such foundation does not exist in fact or by reason of matters that can be judicially noticed.

The criticism of the judicial action implied in the opinion of the lower court is wholly unsupported by the record, and does not form an adequate basis for any finding or inference that the territorial judicial system is not adequate to afford full redress for any deprivation of rights.

Dated, January 25, 1950.

Respectfully submitted,
THE BAR ASSOCIATION OF HAWAII,
*Amicus Curiae,*
By Its Executive Committee:
THOMAS M. WADDOUPS,
SAMUEL P. KING,
EDWARD N. SYLVA,
H. R. HEWITT,
W. B. STEPHENSON,
J. DONOVAN FLINT.